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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST VIZCARRA,

Defendant and Appellant.

B297511

(Los Angeles County
Super. Ct. No. BA469561)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norm Shapiro, Judge. Affirmed.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ernest Vizcarra of inflicting corporal injury upon his spouse, Cassaundra R. The court sentenced Vizcarra to a term of probation for 5 years and 120 days in county jail. On appeal, Vizcarra contends that the trial court erred in admitting a recording of a 911 phone call and certain text messages between Vizcarra and Cassaundra. Vizcarra also argues the evidence was insufficient to support the verdict, the prosecutor committed misconduct, and the trial court erred in failing to reduce Vizcarra's conviction to a misdemeanor under Penal Code section 17, subdivision (b).¹ We find no prejudicial error and, therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The information charged Vizcarra with injuring a spouse under section 273.5, subdivision (a) (count 1); criminal threat under section 422, subdivision (a) (count 2); and child abuse under section 273a, subdivision (a) (count 3).

A. The Prosecution's Evidence

On July 2, 2018, Cassaundra and Vizcarra separated. Cassaundra took their then two-year-old son, Damien, with her.² On July 10, 2018, Cassaundra sent Vizcarra a text to ask whether she could bring Damien to visit him on Vizcarra's birthday, which was the next day. Vizcarra agreed to the visit.

During the July 11, 2018 visit, the conversation between Cassaundra and Vizcarra became heated as it became clear that

¹ All unspecified statutory references are to the Penal Code.

² We use first names of mother and son to protect the personal privacy of Damien, a child in a Family Code proceeding. (Cal. Rules of Court, rule 8.90(b)(1), (11).)

they would not be reconciling. As Cassaundra got ready to leave, Damien threw his shoes over a pool gate. Cassaundra entered the pool area and retrieved the shoes. As she turned around, Vizcarra pushed Cassaundra into the shallow end of the swimming pool. Cassaundra tried to exit the pool, but Vizcarra pushed at her chest and her neck with both hands, trying to keep her in or under the water and holding her in such a way that most of her body from below her nose was under water. After a few seconds, Vizcarra let Cassaundra go, and she ran out of the pool.

Cassaundra then ran to get Damien, who was on the other side of the pool gate. But Vizcarra closed the pool gate and squeezed Cassaundra's neck "really hard" for "a long time[,] [m]aybe a minute." Because of the force, Cassaundra could not get enough air to scream. As Vizcarra then tried to pull Cassaundra back to the pool, Cassaundra wrapped her arms around the gate, and Vizcarra pulled at her legs so her entire body was lifted in the air. Cassaundra screamed for help and that Vizcarra was scaring Damien. Vizcarra let Cassaundra go. Cassaundra testified that at some time between the struggle in the pool and at the gate, Vizcarra said, "after everything I've done for you and your family, you are just going to fucking leave me." She also testified that some time prior to July 11, 2018, Vizcarra told her that if she ever left him, "they would never find [her] body." While that comment had scared her, she gave him the "benefit [of] the doubt."

After Vizcarra let her go, Cassaundra picked up Damien, and Vizcarra grabbed Damien's legs. Cassaundra yelled for help and asked Vizcarra to let Damien go because Vizcarra was scaring him. Vizcarra let Damien go. Cassaundra fled to a

neighbor's house. Cassaundra testified that the neighbor asked if there was something wrong, and Cassaundra responded that Vizcarra "lost it."

The neighbor, Magdaleno Gomez, testified that he heard screaming and pounding on his door. When he opened his door, he saw Cassaundra, who was crying, wet, and seemed excited. He asked what happened, and she responded that Vizcarra had been violent. Gomez called 911. On the recording of the 911 call, the operator asked how Vizcarra had been violent, and Gomez can be heard asking, "Was he hitting you with his hands or what was he hitting you? He threw you what?" Cassaundra responded, "He threw me in the pool and he was strangling me."

The police arrived within five to seven minutes. According to one of the responding officers, Detective Maria Chavez, Cassaundra was crying and seemed upset. Damien seemed afraid and confused. Detective Chavez observed that Cassaundra had redness and scratches on both sides of her neck as well as the back of her neck where her neck met her hairline. Detective Chavez, who investigated over 25 cases of choking, testified the markings on Cassaundra's neck were similar to those she observed on choking victims. Further, Detective Chavez observed scratches on Cassaundra's forearms and a bruise to her back upper shoulder. Detective Chavez took photographs of Cassaundra's injuries. Another responding officer, Sergio Andrade, similarly observed injuries around Cassaundra's neck and a scratch on the bridge of her nose.

Cassaundra went to the emergency room that same night, seeking medical attention for injuries to her forearms. Although she told the emergency room nurse that she has been assaulted and complained about pain in her arm, Cassaundra did not

mention any other injuries. Cassaundra had difficulty swallowing or speaking for two days after the incident.

During cross-examination, Vizcarra's counsel asked Cassaundra whether she texted Vizcarra several times between 11:50 p.m. and 3 a.m. on July 10, 2018, and whether she was upset when texting him because she found out Vizcarra was on a date with a woman. Defense counsel introduced the text messages and continued to question Cassaundra about their content. Defense counsel also asked if Cassaundra's plan was to drop off Damien on July 11, 2018, to which Cassaundra responded she "would never leave [Vizcarra] alone with Damien." On redirect, Cassaundra testified that she would not leave Damien alone with Vizcarra because Damien needs someone levelheaded and patient; and she did not trust Vizcarra, who suffered from post-traumatic stress disorder (PTSD) and bipolar disorder, to be alone with Damien.

B. The Defense's Evidence

1. *Percipient Witness Testimony*

Vizcarra testified that in 2015, he was honorably discharged from the military because of knee and shoulder injuries. After he left the military, Vizcarra was diagnosed with PTSD and bipolar disorder. At the time of trial, Vizcarra managed these conditions with medications, therapy, and religion. In May 2018, however, Vizcarra stopped taking medication for his PTSD and bipolar disorder because they made him feel emotionally numb. He preferred to use medical marijuana because he felt mentally sharper, more relaxed, and a "happy-go-lucky guy."

In May 2018, Vizcarra, Cassaundra, and Damien lived with Cassaundra's mother. Vizcarra encouraged Cassaundra to

pursue a career because if something bad happened to him, she would not be able to support Damien, who was autistic. Vizcarra committed to being a stay-at-home dad. Vizcarra felt that Cassaundra's mother resented him. In June 2018, Vizcarra and Cassaundra moved to a back house on Vizcarra's sister's property.

On July 2, 2018, Vizcarra told Cassaundra that he no longer wanted to spend time with her family because they made him feel uneasy. Cassaundra explained that was "a deal breaker," and left Vizcarra. Vizcarra became distraught and contemplated suicide. He texted Cassaundra that he had to give his gun to a friend from the army because of his suicidal thoughts, that she was hurting him, and that he wanted her back.

Vizcarra asked Cassaundra to reconcile. Cassaundra told Vizcarra to move on, and on July 8 and July 10, 2018, Vizcarra went on dates with Kristine Sobarzo. Cassaundra called Vizcarra between 10:00 p.m. and 11:00 p.m. on July 10, 2018, while he and Sobarzo were driving somewhere. Cassaundra asked Vizcarra who he was with and where he was going. Sobarzo, who could over hear the call because it was on speaker phone, testified that Cassaundra was hostile. Vizcarra testified that Cassaundra then sent several text messages to him that night.

During Cassaundra's and Damien's visit to Vizcarra's house on July 11, 2018, Cassaundra and Vizcarra talked about divorce and child support payments. At some point, Cassaundra asked to change Damien's diaper, even though she did not have a diaper bag with her. She went into Vizcarra's house, and then Vizcarra heard Cassaundra yelling. Cassaundra saw messages on Vizcarra's computer from Sobarzo and told Vizcarra she would

reconcile with him if he stopped seeing Sobarzo. Vizcarra refused. Cassaundra said “negative things” about Vizcarra and Sobarzo and told Vizcarra that she was having an “emotional affair” with a man named Ryan. Vizcarra told Cassaundra that if she had someone, then she should not be upset that he moved on. Cassaundra then became “upset” and “frantic.” Vizcarra tried to calm her down, but Cassaundra continued to verbally attack him, so he asked her to leave. He asked her to be sure to drive carefully when she left because the car’s suspension was “shot.”

Damien then threw one of his shoes through the pool gate, towards the pool. Cassaundra went to retrieve it, and Vizcarra turned to make sure the gate was closed so Damien did not enter the pool area. When Vizcarra turned back towards the pool, he saw Cassaundra “coming at” him. Vizcarra put his arms up, and the impact launched Vizcarra against the gate and Cassaundra into the pool. When Cassaundra got back above water, she told Vizcarra at least twice that he was never going to see his son again. As she walked by him, Vizcarra became concerned that she was too angry to drive safely, so he hugged her from behind. Cassaundra grabbed the pool gate and began to scream. As soon as Vizcarra heard Cassaundra yell “let go,” he let her go. When Cassaundra opened the gate, Vizcarra darted through to pick up Damien. As Vizcarra held Damien, Cassaundra tried to pull Damien out of his arms. Cassaundra began to scream “help” and “call 911.” Eventually, Vizcarra let Damien go and told Cassaundra that no one was hurting her. To show her that he was not a threat, Vizcarra went back into the house and Cassaundra left.

When Vizcarra spoke to the police about the incident, he told them only that Cassaundra was wet because he had

redirected her to the pool. The police then stopped questioning him. Vizcarra did not tell the police the whole story because he got “these looks as if they weren’t believing me,” and asked for a lawyer.

Sobarzo testified that she has never seen Vizcarra be violent; she allows her eight-year-old daughter to spend time with him; Vizcarra and her daughter have a special father-daughter relationship; and that Vizcarra is calm with her daughter who loves Vizcarra.

2. *Expert Testimony*

Defense witness Dr. Ryan O’Connor reviewed Cassaundra’s medical records for her treatment on July 11, 2018, as well as the police reports. He testified the medical records do not include any notation of injuries to Cassaundra’s neck. He also testified the photographs of Cassaundra’s neck were of such poor quality that he was “very hesitant to make definitive comments” concerning those photographs. Dr. O’Connor noted strangulation may not result in physical signs of trauma because little force is needed to compress the vital structures in the front of the neck to block off blood flow to the head. Redness can be transitory and disappear within minutes. Trauma to the neck, however, need not be consistent with strangulation and can, for instance, be the result of a struggle. In cases of domestic violence, a physician is “supposed to screen for strangulation because a patient might not offer it” and because strangulation can cause health problems later. In this case, the word, “strangulation,” does not appear at all in the medical records.

C. *Prosecution’s Rebuttal*

After the defense cross-examined Cassaundra about the text messages she sent to Vizcarra beginning the night of July 10,

2018, at 11:50 p.m., the district attorney asked Cassaundra whether she had other texts. Cassaundra provided those text messages to the district attorney, who re-called Cassaundra for rebuttal.

The text messages introduced by the prosecution revealed that during the early morning of July 11, 2018, Vizcarra responded to a number of Cassaundra's text messages. Further, during the time period July 2 through July 11, 2018, Vizcarra sent numerous hostile text messages to Cassaundra, including "fuck your family," "[y]our grandma [is] a bitch too," "I'm sorry your mom whore[d] around when you were a kid and nobody paid much attention to you. . . . Just because now [your mom] wants a relationship with you bec[ause] she has nothing doesn't mean she can take it from me. Something that I put work in to build," and "I don't know what you are trying to prove but you are doing it all wrong and more anger is being built towards you guys. [¶] Cut it [out] now and we can be fine but you are really wearing me down. [¶] After everything. [¶] This is what you do to me." Vizcarra also proposed that he could take Damien on the weekends, "so [Cassaundra could] go out whoring." Vizcarra also referred to his marijuana use, including sending photographs of a marijuana pipe, and stating "I know the weed brings out the bad boy side in me that I lay dormant because I love you It's not intentional when I'm high. I can't control it though this is not a short cut to the future." Vizcarra also texted that he had to give his gun to a friend because he was contemplating killing himself.

D. The Verdict and Sentencing

After the prosecution presented its case, the court granted Vizcarra's motion to acquit him on count 3, the child abuse charge. On January 28, 2019, the jury also acquitted Vizcarra of

criminal threats in count 2, but convicted him of inflicting corporal injury to his spouse under section 273.5 as charged in count 1. On February 13, 2019, Vizcarra filed a motion under section 17, subdivision (b), requesting the trial court reduce his felony conviction under section 273.5 to a misdemeanor. The trial court placed Vizcarra on felony probation and sentenced him to 120 days in the county jail.

Vizcarra filed a timely notice of appeal.

DISCUSSION

A. Admission of the 911 Call

Vizcarra contends the 911 call and Gomez's testimony relating to that call were inadmissible hearsay that the trial court should have excluded. Although the People concede Gomez's statements during and concerning the 911 call should not have been admitted, they argue Cassaundra's statements to Gomez before and during the 911 call were admissible under the spontaneous statement exception to the hearsay rule. We agree.

Under Evidence Code section 1240, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." Cassaundra's statements to Gomez and captured on the recording of the 911 call satisfies these two conditions. Within minutes of her struggle with Vizcarra, Cassaundra described to Gomez that Vizcarra had been violent with her. During this time, Gomez observed that Cassaundra was wet, crying, and excited. Immediately thereafter, Gomez called 911, and when the 911

operator asked how Vizcarra had been violent, Gomez, in turn, asked Cassaundra, “Was he hitting you with his hands or what was he hitting you?” Cassaundra responded, “He threw me in the pool and he was strangling me.” Given the limited passage of time between the incident and Cassaundra’s statements as well as Cassaundra’s emotional and physical state, the trial court did not abuse its discretion in concluding Cassaundra’s statements fell within the spontaneous statement exception to the hearsay rule. (See *People v. Merriman* (2014) 60 Cal.4th 1, 64-65.) Although Cassaundra was prompted to speak because of questions posed to her, Gomez’s questions of “what happened?” and “Was he hitting you with his hands or what was he hitting you?” were simple and non-suggestive, especially when considered in light of her responses. Accordingly, these questions did not negate the spontaneity of her statements. (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1590.)

As to Gomez’s statements, they do not fall within a hearsay exception. However, there was ample evidence at trial that Vizcarra had been violent, including Cassaundra’s testimony, her spontaneous statements to Gomez before and during the 911 call, the testimony of Detective Chavez, and the testimony of Officer Andrade. Thus, we cannot say that the exclusion of Gomez’s statements during the 911 call would have resulted in a more favorable result for Vizcarra. Any error in admitting Gomez’s statements was therefore harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 837-838.)

B. Admission of Text Messages

Vizcarra next argues that the trial court abused its discretion in “admitting text messages that suggested [Vizcarra] was a danger to society because he suffered from PTSD, had

access to a gun, and used marijuana, without giving [him] a continuance to review [his] medical records and a meaningful opportunity to consult with an expert.” Vizcarra contends these text messages were irrelevant and prejudicial under Evidence Code section 352.

The People argue the text messages were relevant to and probative of the charge of criminal threats under section 422 in that they go to whether Cassaundra reasonably sustained fear for her safety and to the issue of motive. (§ 422; *People v. Fruits* (2016) 247 Cal.App.4th 188, 204 [“prior threats and acts of violence against a victim are admissible under [Evid.] Code[, §] 1101, [subd.] (b), to establish motive in a prosecution involving violence or the threat of violence against the same victim”].) “A defendant is not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim’s relationship was peaceful and friendly.” (*People v. Fruits, supra*, at p. 204.)

The People further argue they sought to introduce the disputed text messages only after the defense put them at issue and used them to attempt to paint Cassaundra as a jealous woman who unreasonably kept Damien from his father and sought sole custody of Damien in divorce proceedings. Specifically, during cross-examination of Cassaundra, defense counsel introduced copies of text messages between Cassaundra and Vizcarra from July 10 to July 11, 2018, as defense exhibits A and B. Defense counsel asked Cassaundra whether between 11:00 p.m. and 3:23 a.m. the night before the July 11, 2018 incident, Cassaundra “called [Vizcarra] a lot and sent him several text messages.” Defense counsel also inquired whether Cassaundra was upset that Vizcarra was not responding to her

texts, whether Cassaundra sent text messages asking Vizcarra to call her, and whether Cassaundra sent text messages asking who the woman was that Vizcarra was with that night. Defense counsel also asked Cassaundra, “Now, on July 11, 2018, you were just supposed to drop off Damien, right?” Cassaundra responded, “No.” Defense counsel then asked, “No?” to which Cassaundra responded that she would never leave Damien alone with Vizcarra. Defense counsel also asked Cassaundra whether she sought sole custody of Damien in divorce proceedings and whether, when Cassaundra found out about Vizcarra’s girlfriend, Cassaundra was “going to make sure that he never saw his son again.”

The People re-called Cassaundra on rebuttal and introduced text messages between Cassaundra and Vizcarra for the time period June 28 through July 11, 2018. Some of the text messages were a continuation of the text conversation reflected in defense exhibit B and revealed Vizcarra responded to Cassaundra in the early morning hours of July 11, 2018. Other text messages from Vizcarra demonstrated that he was volatile and thus clarified why Cassaundra would not leave Damien alone with him, including a photograph of a marijuana pipe with a notation that it was Vizcarra’s “reward for holding it down with Damien”; Vizcarra’s admission that marijuana brings out the “bad boy side” of him; Vizcarra’s text that he gave his gun to a friend to avoid suicide; and Vizcarra’s text that he is “an animal that snaps because [he’s] provoked.” Accordingly, the trial court did not abuse its discretion in admitting these text messages.

Nor did the trial court abuse its discretion in denying Vizcarra’s request for a trial continuance so that an expert could review Vizcarra’s medical files. Defense counsel argued

admission of the text messages necessitated an expert to testify that persons who used marijuana or suffered from PTSD or bipolar disorder did not have a greater propensity for violence. However, the People never took the position at trial that because Vizcarra suffered from these conditions, he was more likely to be violent. Moreover, the trial court agreed to appoint an expert, who could have testified generally as to whether persons with these conditions or who used marijuana were more violent without reviewing Vizcarra's medical files. Vizcarra also requested the continuance midtrial, but failed to demonstrate diligence in preparing for trial. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1106.) Vizcarra knew he suffered from PTSD and bipolar disorder and chose to use medical marijuana for these conditions. While true that the People agreed prior to trial to not raise Vizcarra's conditions, defense counsel opened the door by repeatedly questioning Cassaundra about seeking sole custody in upcoming divorce proceedings and arguing Cassaundra thus had a motive to lie in the criminal proceedings.

C. Substantial Evidence Supported the Jury's Finding that Vizcarra Was Guilty of Corporal Injury to a Spouse

Subdivision (a) of section 273.5 makes it a felony to willfully inflict corporal injury "resulting in a traumatic condition upon a victim described in subdivision (b)." Subdivision (b) sets forth four categories of victims, including a spouse or a fellow parent of the offender's child. (§ 273.5, subd. (b)(1) & (4).) The statute defines "traumatic condition" as "a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation . . . , whether of a minor or serious nature, caused by a physical force."

(§ 273.5, subd. (d).) The traumatic condition must be caused by the defendant's direct application of force. (*People v. Jackson* (2000) 77 Cal.App.4th 574, 575.) For section 273.5 purposes, the term "‘strangulation’" includes "impeding the normal breathing or circulation of the blood of a person by applying pressure on the throat or neck." (§ 273.5, subd. (d).)

Citing *People v. Abrego* (1993) 21 Cal.App.4th 133, 138, Vizcarra argues insufficient evidence supported the jury's verdict that Vizcarra was guilty of corporal injury against Cassaundra because "[s]oreness and tenderness are insufficient to establish a traumatic condition within the meaning of section 273.5."³ In *Abrego*, the victim was slapped in the head five times, but she stated that because she was drunk at the time of the attack, she did not feel any pain. The victim testified she had not been injured or bruised, and did not seek medical treatment. While she told a police officer who responded to the scene that her face and head were sore and tender, the officer did not notice any injuries. (*Id.* at p. 135.) In reviewing the sufficiency of the evidence, the appellate court determined these facts were not sufficient to establish a violation of section 273.5. (*Id.* at p. 137.)

In contrast, both Detective Chavez and Officer Andrade observed redness around Cassaundra's neck that Detective Chavez testified was consistent with choking. Redness is sufficient to establish a traumatic condition under section 273.5. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 771.) Further,

³ Vizcarra also argues the bruises on Cassaundra's arms did not result from Vizcarra's direct application of force, and therefore do not qualify as a traumatic condition. Because we conclude the redness around Cassaundra's neck was sufficient to support the jury's verdict, we need not address this issue.

Cassaundra testified she had difficulty swallowing or speaking for two days following the incident.

D. Prosecutorial Misconduct

Vizcarra contends the prosecutor engaged in numerous acts of misconduct during his closing argument. “A prosecutor’s conduct violates the federal Constitution when it ‘infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.] ‘Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1184.) “If a prosecutorial misconduct claim is based on the prosecutor’s arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. [Citations.] No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. [Citation.]” (*People v. Woods* (2006) 146 Cal.App.4th 106, 111.) We need not infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. (*People v. Wilson* (2005) 36 Cal.4th 309, 338.) “In general, ‘“a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety.’ ” ’ [Citation.]” (*People v. Young, supra*, at pp. 1184-1185.)

As we explain below, none of the alleged misconduct warrants reversal.

1. *Disparaging Defense Counsel*

Vizcarra contends that during the People's rebuttal argument, the prosecutor suggested defense counsel was dishonest and fabricated defenses. Specifically, the prosecutor stated: "Now counsel talked about circumstantial evidence and saying also talking about, look if there are two versions of the story, you need to give the defendant a not guilty verdict. That is not what the instructions says. They always skip out the last part, and the last part of that instruction says, when you must reject unreasonable stories—unreasonable interpretations of the evidence. And that is exactly what defense counsel is trying to do. This whole trial has been—they are trying to give you half truths and misdirect you." Defense counsel objected, "[i]mpeach argument" and the trial court responded, "Well, again, it is only argument. [The prosecutor's] take—he is not saying, you did not, you have acted very professionally. You should not take that personally." The prosecutor also stated: "Now, at trial they started with she is crazy. She is jilted ex who wants to get mad at him because he is seeing another woman, that is why she was calling. That is why he wasn't responding. That is why she went over there the next day. Then they get into this whole, he did touch her but it was only out of love for [Damien] and concern for her safety. Why are they switching now, because they have to come up with some reason to explain the bruises." After defense counsel objected that it was an "[i]mproper argument regarding someone's right to counsel," the court stated, "I don't see it quite that way. Go ahead."

There is no reasonable likelihood the jury construed the prosecutor's statements as an attack on counsel's integrity or commentary about Vizcarra's right to counsel. The prosecutor

was responding to defense counsel's incomplete description of CALJIC No. 2.01 concerning circumstantial evidence and how the defense's theories comported with the evidence at trial. Further, the trial court negated the effect of any perceived slight against defense counsel by advising the jury repeatedly that argument is not evidence and stating that defense counsel, "[has] acted very professionally."

2. *Alleged Vouching*

Vizcarra argues the prosecutor's statement that "[Cassandra] is not the type of person who will make up a story," was improper vouching. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. . . . Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. . . . However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching.' [Citations.]" (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584.)

Considered in context, it becomes clear that the prosecutor's comments were based on reasonable inferences from evidence in the record. During closing argument, defense counsel argued the prosecutor attempted to paint Vizcarra as a bad guy. During rebuttal, the prosecutor explained why it was relevant for the jury to know that Vizcarra had cheated on Cassandra before, "because when the first case was presented to you, it was

presented like Cassa[u]ndra was this crazy ex-wife basically in the process of getting a divorce and as soon as she found out her husband had cheated on her, she went and called the police and basically engineered this. It's relevant for you to all know, look this happened before, and she didn't call the police. She is not the type of person who will make up a story and call the police" Accordingly, the prosecutor's statement is urging the jury to make a reasonable inference from the evidence that was presented at trial and not improper vouching.

3. ***Referring to Facts Not in Evidence***

The prosecution may not bolster their case by referring to facts outside the evidence presented at trial. (*People v. Ward* (2005) 36 Cal.4th 186, 215.) However, "[i]t is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.)

Here, Vizcarra contends the prosecutor improperly referred to matters outside the record during his rebuttal argument. Specifically, the prosecutor suggested that although Vizcarra testified that he "bear hugged" Cassaundra from behind while she was soaking wet, the reason the police did not observe that Vizcarra was wet when they questioned him was because "[h]e went into the house, he could have changed clothes." Upon defense counsel's objection to this statement as a fact outside the evidence, the prosecutor responded that Vizcarra changing his clothes was a reasonable inference from Vizcarra's testimony that he went into his house as Cassaundra was leaving. We agree that this is a reasonable inference that could be drawn from the

evidence, and it was up to the jury to weigh and consider. (*People v. Willard* (1907) 150 Cal. 543, 552 [“Counsel have a right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel”].) Moreover, the court admonished the jury that, “Again ladies and gentlemen, this is not evidence [in] the case. You have the record. If there is any question about a particular fact, [the court staff] will be able to give you the reread . . .” Further, the prosecutor’s statement did not necessarily discredit Vizcarra’s testimony. If anything, it provided an explanation that would make his testimony that he bear-hugged Cassaundra while she was wet consistent with the fact that the police did not observe Vizcarra was wet when they questioned him.

4. ***Diluted the Burden of Proof***

Vizcarra next contends the prosecutor diluted the burden of proof in telling the jury to use their commonsense as to what self-defense is. Specifically, during his rebuttal argument, the prosecutor stated: “The fact that he bear hugged her and was holding her from behind, and she got injured is still enough for him to be guilty of [section] 273.5, because he is not acting in self defense at that point, because like I said, it is not enough to have future belief in harm. The harm actually has to be imminent, it needs to be right then and there. You know, using your commonsense model of what self defense is. I can’t go to a bar, see a guy mad dog me, pull out a gun and shoot him. I thought he would come at me. [Vizcarra] is saying I thought [Cassaundra] would get into the truck and that’s why he goes on

this big old story about her dad's truck I was worried she would be upset, get mad and get into an accident. Therefore, I decide[d] to use physical force to restrain her.”

The prosecutor's argument did not dilute the burden of proof. Again, when considered in context, the prosecutor's comments could be fairly taken as asking the jury to consider whether Vizcarra's belief of harm and his response to it were reasonable. This is the same determination the jury would need to make pursuant to the jury instruction CALJIC No. 5.30 regarding self-defense, which provides: “It is lawful for a person who is being assaulted to defend himself from attack *if, as a reasonable person*, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, that person may use all force and means which he believes to be reasonably necessary *and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.*” (Italics added.) As to the burden of proof, the trial court and both counsel repeatedly advised the jury of the correct burden of proof.

E. The Trial Court Did Not Abuse Its Discretion in Implicitly Denying Vizcarra's Section 17, Subdivision (b) Motion to Reduce His Felony Conviction to a Misdemeanor

Crimes punishable as either a felony or misdemeanor are referred to as “‘wobbler[s]’” and “are punishable either by a term in state prison or by imprisonment in county jail and/or by a fine.” (*People v. Park* (2013) 56 Cal.4th 782, 789; see § 17, subd. (b).) Under section 17, subdivision (b), the decision whether to reduce a wobbler rests within the discretion of the court. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968,

977.) In the absence of a showing that the court's sentencing decision was irrational or arbitrary, "the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citation.]” (*Id.* at pp. 977-978.) In exercising its discretion under section 17, subdivision (b), relevant factors to consider include “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at trial.” [Citations.]” (*People v. Superior Court (Alvarez)*, *supra*, at p. 978.) “A failure to exercise discretion . . . may constitute an abuse of discretion.” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.)

Vizcarra argues the trial court “failed to consider whether the charge should be reduced to a misdemeanor,” and therefore should be remanded to the trial court to properly exercise its discretion. We disagree. The record supports that the trial court considered but rejected Vizcarra’s section 17, subdivision (b) motion. At the sentencing hearing, the trial court heard from Cassaundra and two defense witnesses. The trial court then asked if there was anything else. Defense counsel referred the trial court to her section 17, subdivision (b) motion, and the trial court responded “And I read it. If you would like to go ahead and say more on that please do.” Defense counsel then argued that since trial, there is no evidence that Vizcarra has violated the protective order and that the trial court show leniency and “give him a chance at probation.” The trial court also heard argument from the prosecutor, who argued that Vizcarra has not shown any remorse or recognition that he did anything wrong, and thus Vizcarra’s sentence should include time in state prison. Although

the court did not explicitly reject the section 17 motion, the court did so implicitly when it sentenced Vizcarra to 120 days in county jail and five years' probation. No purpose would be served by remanding the matter. Further, based upon the record, we do not find that the trial court's decision implicitly denying Vizcarra's section 17, subdivision (b) motion was an abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

SINANIAN, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.